No. 80-381

In The

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Supreme Court of the United States

OCTOBER TERM, 1980

JOHN DI GILIO, PETITIONER

-vs-

UNITED STATES OF AMERICA

PETITIONER'S REPLY BRIEF AND SUPPLEMENTAL APPENDIX FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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REBUTTAL TO GOVERNMENT'S STATEMENT

The Government has constructed an erroneous "Statement" of the case. It contends that the two factual issues at the competency hearing were (1) the extent of petitioner's mental disability resulting from organic brain damage which might have been caused by head injuries, and (2) the issue of malingering (Resp. 1).

The first so-called issue begs the question in exactly the same way the trial judge did: by making any finding of incompetence dependent on petitioner's ability to prove causal organic brain damage. The correct issue should have been whether petitioner was incompetent under the Dusky standard <u>regardless of his ability to prove cause</u>. The Government has thus misframed the issue to subsume the very error of which petitioner complains: that the trial judge put the burden on petitioner to prove a <u>cause</u> of incompetency rather than on the Government to prove the <u>fact</u> of competency under Dusky.

The evidence and findings demonstrated that there was no malingering. All the doctors considered and ruled out the possibility of malingering (Pet. 5). The Government does not attempt to address the portions of the record supporting petitioner's assertion. Indeed, the trial judge acknowledged that petitioner suffers from "some form of organic brain damage" (Pet. App. 20a) and that he is "extremely mentally deficient" (6/19/75, T.72). Nor does the Government attempt to rebut the overwhelming evidence cited in the Petition to describe the objective as well as subjective symptoms of petitioner's disorders (Pet. 3-5).

There was no malingering in the ordinary sense in this case. The only issue in this vein was whether petitioner demonstrated -- as a symptom of his mental deficiency -- an unwillingness to do his best on certain tests in order to protect his ego by not having to face up to the truth that his best efforts are dismally poor. The trial judge recognized this:

> He tests lower than his actual mental capacity. The reasons for this are complicated as set forth in my findings on June 19, 1975. To state his situation briefly, DiGilio refuses to extend his best efforts on testing, fearful that if he did so he would do poorly and would then have to recognize his limited intellectual capacity. Doing poorly on tests after not trying to do well gives him ego protection against the stigma of the results.
> (Pet. App. 53a)

The only finding that there was simulation in any culpable sense was the trial judge's determination that petitioner's claim that the jurors were being changed on him during the trial was false. But this was based on a clear misstatement of the record by the trial judge in that petitioner did have a medical history of hallucinatory behavior (Pet. App. M). The determination was also made without any hearing on the thing amiss; the trial judge did not even inquire about it prior to making his findings and petitioner had no opportunity to be heard or to direct the court's attention to those portions of the medical record which would have prevented the error.

The Government's description of the criminal activity "revealed" by the evidence at trial (Resp. 2) also begs the question since the very issue on the Petition is the reliability of the fact finding process where petitioner's ability to defend himself is lacking. As this court stated in **Drope v. Missouri, 420 U.S. 162,** the prohibition against trying such an individual is "fundamental to an adversary system of justice" because akin to a trial in "absentia" since the defendant "is in reality afforded no opportunity to defend himself" **(420 U.S. 170-172).**

The Government's Statement goes on to unilaterally designate Dr. Rosner as petitioner's "chief witness" (Rb3). The basis for this designation is not revealed. Certainly, it does not come from petitioner's contentions. Petitioner summarized his expert testimony in an appendix to the Court of Appeals and placed Dr. Rosner 7th in a list of 9 organized in descending order of significance with psychiatrist Abramson (of Son of Sam fame) in the lead and Dr. Feinberg, a general practitioner, last (Pet. Supp. App. A).

In fact, a discussion of Dr. Rosner's testimony took up only one out of 23 pages of defendant's preposed fact findings submitted to the trial judge.

Designation of Dr. Rosner as petitioner's "chief witness" is clearly a ploy to bootstrap the Dusky issue by the simple expedience of assuming that petitioner's ability to prove the cause of incompetence is the "Chief" issue -- the very premise petitioner challenges.

LEGAL ARGUMENT

POINT I

THE GOVERNMENT HAS FAILED TO MEET PETITIONER'S ARGUMENTS CONCERNING THE DISTRICT COURT'S MISAPPLICATION OF DUSKY

The Government's brief completely avoids the issues raised by petitioner. It claims that petitioner mis-characterizes the trial judge's findings but fails to acknowledge, much less address the judge's own words in which he stated that:

> ...I find that the determinative testimony comes essentially from those witnesses who could testify knowledgeably about the claimed root cause of the defendant's problems -- his organic brain disease. (emphasis supplied) (Pet. 13).
>
> * * *
>
> Because I find the testimony of Dr. Somberg more credible than that of Dr. Rosner, that there exists no discernible angioma in the right parietal area, and if such a lesion did exist it would be on the non-dominant side, thus not affecting the intellectual ability and personality of defendant,

> the psychiatric and psychological evaluations made by the defense witnesses becomes incidental to the determination. (emphasis supplied) (Pet. 14).
>
> * * *
>
> The evidence presented in this de novo competency hearing preponderates in favor of a finding that John DiGilio does not suffer from the kind of organic brain disease which he has asserted as the basis for an alleged incompetency to be resentenced. Without that organic disease linchpin, the carefully perceived functional overlay becomes too transparent a structure to support the defendant's theory. (Pet. App. 74a) (emphasis supplied)

This, and the other quotations cited in the Petition (p.12-15), demonstrate a clear circumvention of the Dusky standard.

The Government's tack consists of trying to obscure the trial judge's error by shielding it with identical error. Without any justification whatever, the Government unilaterally proclaims Dr. Rosner as petitioner's "chief witness" (Rb. 6) and then says since the judge disbelieved him, the ruling was correct. Dr. Rosner was no more petitioner's "chief witness" than causality super-

cedes the fact of incompetency under Dusky. Indeed, in the first hearing on the issue of capacity to be tried, neither Rosner nor any angioma theory of causality was even presented. The evidence at that hearing consisted of mainly the three psychiatrists who testified as to petitioner's capacity (two said he was incompetent and one said he didn't know).

When Dr. Rosner was presented in the second competency hearing, his position as a witness on the purely collateral issue of causality was clearly reflected in the Summary of Expert Witnesses attached to petitioner's Court of Appeals brief in which Dr. Rosner is listed 7th behind 3 other categories of expertise listed in declining order of importance (psychiatry, first, and general practice, last) (Pet. Supp. App. A). As noted, the entire discussion of Dr. Rosner's testimony in defendant's proposed findings of fact took up only one page out of 23.

Moreover, regardless of nomenclature, the simple fact is that the trial judge disregarded all psychiatric and psychological testimony that

petitioner was incompetent by the Dusky standard and based his findings on petitioner's failure to convince him that angioma was the cause of incompetence (Pet. App. 62a, 74). The Government never even attempts to come to grips with this key issue. The reason is simple: the trial judge did in fact put the burden of proof on petitioner to prove the cause of incompetency. He did, in fact, circumvent the issue of the existence of competency (regardless of cause) pursuant to Dusky and he did this against a record in which he acknowledged the existence of organic brain disease and the Government could not produce a single psychiatrist or psychologist upon which the court could rely to testify that petitioner was competent under Dusky (Pet. Supp. App. A).

The Government's response to the Petition is further erroneous in its assertion that petitioner does not challenge the competency to be tried determination (Resp. 7). Petitioner has challenged that determination by arguing that the court applied the wrong standard of proof. (Pet.

17).

In addition, the Government notes that the district court "observed" petitioner during the proceedings and concluded that competency existed (Resp. 7). The Government apparently suggests that the trial judge's determination is supportable by lay observations outside the record. Such an approach is not only unfair, but is nonreviewable and hence impermissible.

POINT II

COMPETENCY TO STAND TRIAL OR BE SENTENCED MUST BE PROVEN BEYOND A REASONABLE DOUBT

The Government has missed petitioner's point that, insofar as the integrity of the fact finding process is concerned, the issue of competency is different in kind rather than degree from other trial issues which may affect reliability of the outcome. So long as the defendant is mentally competent he has the time tested efficacy of the adversary system to uncover and correct any violation of his rights. But when a defendant is not competent, the adversary system is unavailable to safeguard any of his rights. In such a case, it works only to mask a trial in "absentia" with outward legitimacy.

The Government fails to squarely meet petitioner's contention that a defendant cannot be found guilty of a crime beyond a reasonable doubt if there is a reasonable doubt as to his ability to defend himself. The Government's at-

tempt to minimize the issue by analogy to search and seizure cases and confession cases is unpersuasive since, regardless of any other consideration, they go to a single aspect of the proofs against which a competent defendant may effectively defend.

Moreover, the example of suppression of evidence seized in violation of the Fourth Amendment is totally inapposite since the purpose of the exclusionary rule is to safeguard the integrity of law enforcement procedures and not the fact finding process. Indeed, to the extent that the exclusionary rule interferes with the fact finding process, it does so in a way favorable to the defendant.

Similarly, the issue of a confession goes only to a single aspect of the proofs. Even in a worst case scenario a defendant still has his faculties intact to work with counsel in overcoming any disadvantage. For example, the erroneous admission of a false confession can be offset by defendant's effective presentation of an alibi or other collateral facts or inferences rebutting

either guilt or the confession.

The Government's attempt to distinguish **Addington** by complaining that a finding of incompetency to be tried or sentenced will not necessarily result in a loss of liberty is unpersuasive. It would be singularly ironic to require civil commitment as the inescapable price for protection against loss of liberty resulting from an unfair trial. Moreover, the Government's position is undercut, in a very practical sense, by the procedures required by **18 U.S.C. §4246** which provides that, upon a finding of mental incompetency "...the court may commit the accused to the custody of the Attorney General or his authorized representative until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law." The section makes provision for further commitment depending upon the defendant's mental condition (Pet. Supp. App. B). Thus, the Government fails to recognize that any defendant found incompetent to be tried risks loss of liberty. Certainly, there is enough enlightened room

in our system to give more than grudging currency to the concept of presumption of innocence.

Lastly, the Government's contention that there is no authority for utilization of the reasonable doubt standard in competency proceedings is erroneous. See U.S. v. Lancaster, 7 Bissell 440, 443 (7 Cir. 1877) and U.S. v. Chisolm, 148 F. 284 (D.C.S.C. Ala., 1906), Cf. U.S. v. Makris, 535 F.2d 899 (5 Cir. 1976).

CONCLUSION

For the above reasons, it is respectfully requested that the within Petition be granted.

Respectfully submitted,

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Appendix

SUPPLEMENTAL APPENDIX A

MENTAL DEFECTIVES 18 U.S.C. §4246

§4246. Procedure upon finding of mental incompetency

Whenever the trial court shall determine in accordance with sections 4244 and 4245 of this title [18 USCS §§4244, 4245] that an accused is or was mentally incompetent, the court may commit the accused to the custody of the Attorney General or his authorized representative, until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law. And if the court after hearing as provided in the preceding sections 4244 and 4245 [18 USCS §§4244, 4245] shall determine that the conditions specified in the following section 4247 [18 USCS §4247] exist, the commitment shall be governed by section 4248 [18 USCS §4248] as herein provided.

(Added Sept. 7, 1949, ch 535, §1, 63 Stat. 687.)

SUPPLEMENTAL APPENDIX B

SUMMARY OF EXPERT WITNESSES FROM SECOND COMPETENCY PROCEEDING

DEFENSE

PSYCHIATRISTS

1. Abrahamsen-world renowned; based conclusion on observation & study notwithstanding exposure to tapes; Dusky standard used; testified for government in prior competency proceeding.

2. Latimer-extensive contact with patient; used Dusky standard; based conclusion on observation & study notwithstanding exposure to tapes; factually informed.

3. Kritzberg-extensive contact with patient; used Dusky standard.

4. Gagliardi-consistent with first proceeding; used recent testing; used Dusky standard.

PSYCHOLOGIST

Brown-evaluated patient since 1969; used Dusky standard.

NEUROPSYCHOLOGIST

Smith-independent testing

SUPPLEMENTAL APPENDIX B

SUMMARY OF EXPERT WITNESSES FROM SECOND COMPETENCY PROCEEDING

NEUROSURGEON

Rosner-extensive testing and objective findings; used Dusky standard.

INTERNIST

Thaler-extensive observation; objective findings.

GENERAL PRACTITIONER (EENT)

Feinberg-examined patient since 1954 on trauma injuries; confirmed peculiar behavior.

GOVERNMENT

PSYCHIATRISTS

1. Feldman-not board certified-factually uninformed; Dusky standard not used; on cross admits patient's lack of mental competency.

2. Flicker-prejudiced; factually uninformed; not considered in court's conclusion or fact finding; current opinion based solely on tapes contrary to opinion at first hearing.

SUPPLEMENTAL APPENDIX B

SUMMARY OF EXPERT WITNESSES FROM SECOND COMPETENCY PROCEEDING

COURT

NEUROSURGEON

Somberg-not psychiatrist; factually uninformed; on cross admits objective findings; Dusky standard not used.